No. 10326

In the United States

Circuit Court of Appeals

For the Ninth Circuit

H. A. PIERCE,

Appellant,

vs.

ALBERT L. WAGNER,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

REUBEN G. LENSKE,
Yeon Bldg., Portland, Ore.,
Attorney for Appellant.

VAN DYKE & HARRIS,
Calif.-Western States Life Bldg.,
Sacramento, Calif.
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

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The gist of the first point in Appellee's Brief appears on page 2 thereof. Appellee contends that negligence is not pleaded and that in a complaint against an attorney for negligence, it is insufficient to allege negligence in general terms. In support of that contention Appellee cites *Feldesman v. McGovern,* 44 Cal.

App. (2d) 566. In that case the State Court holds that in an action by a client against his attorney the plaintiff must show that if the attorney had performed the act complained of it would have resulted beneficially to the plaintiff. That particular case is one where an attorney had failed to file a petition for discharge on behalf of a bankrupt. The Court held that the bankrupt may not have been entitled to and might not have obtained the discharge, even though the petition for discharge had been filed. In reply we make the following points:

1. That decision was in the State Court where pleadings:

(a) Are insufficient if made in general terms.

(b) Are strictly construed against the pleader on demurrer.

2. The rules of procedure in the Federal Court provide for

(a) Pleading in general terms.

(b) Liberal construction in behalf of the pleader.

3. There are sufficient allegations in plaintiff's complaint to show that the results and sums sought would have inured to the benefit of the plaintiff if defendant had not breached his agreement and duty.

Following are some authorities together with sustaining quotations in support of these points:

38 Col. Law Review 1179.

"The object of the complaint is to indicate to the defendant which grievance is being pressed."

DeLoach v. Crowley's, 128 Fed. (2d) 378, 380 (C.C.A. 5th Cir.).

"But the principle is no longer of force that pleadings will be construed strictly against the pleader. Rule 8(f) says that 'all pleadings shall be so construed as to do substantial justice.' Just what this means is not clear, but it excludes requiring technical exactness, or the making of refined inferences against the pleader, and requires an effort fairly to understand what he attempts to set forth."

Pliner v. Nesvig, et al., (D.C., W.D. Wis.) 42 F. Supp. 297, 298.

"A complaint must be liberally construed in favor of the pleader."

Sparks vs. England, 113 Fed. (2d) 579, 581 (C. C.A. 8th Cir.).

"The rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount which he claims. The requirement is 'a short and plain statement of the claim showing that the pleader is entitled to relief,' and 'a demand for judgment for the relief to which he deems himself entitled.' Rule 8 (a) (2) and (3), 28 U.S.C.A., following Sec. 723 (c). The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments. This court has consistently disapproved of the practice of terminating litigation believed to be without merit, by the dismissal of complaints for informality or insufficiency of statement. See Leimer v. State Mutual Life Assurance Co., (8th Cir.), 108 F. (2d) 302, 305. If it is conceivable that, under the allegations of his complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss

for insufficiency of statement ought not to be granted. See and compare Donelly Garment Co. v. Int. Ladies' Gar. (8th Cir.), 99 F. (2d) 309, 312."

Securities & Exch. Com. vs. Timetrust, Inc., 28 Fed. Supp. 34, 41 (D.C., N.D. Cal. S.D. 1939).

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. Pleadings shall be so construed as to do substantial justice."

Van Dyke v. Broadhurst, 28 Fed. Supp. 737, 740 (D.C. M.D. Penn. 1939).

"Under the present liberal construction of the Rules of Civil Procedure, to avoid dismissal for failure to state a claim upon which relief may be had, it is necessary only to allege sufficient facts to apprize the opposing party of the nature of the claim which will be proved. Technicalities in pleading are no longer observed."

Tahir Erk v. Glenn L. Martin Co., 116 F. (2d) 865, 869 (C.C.A. 4th Cir.).

"We are mindful that in weighing the validity of a motion to dismiss for insufficiency, the duty of the court is not to test the final merit of the claim in order to determine which party is to prevail. Our duty, rather, is to consider whether in the light most favorable to the plaintiff, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim. See Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co. (7th Cir. 1940), 113 F. (2d) 356, 357; Leimer v. State Mut. Life Assur. Co., supra, 108 Fed. (2d) 302 at page 304. See also Bayley & Sons, Inc. v. Blumberg (2d Cir. 1918), 254 F. 696, 698. We are of the opinion that, under such

a consideration, the complaint states a claim for breach of contract and, consequently, that the defendant's motion to dismiss was erroneously granted."

Hannah v. Gulf Power Co. (C.C.A. 5th Cir.), 128 F. (2d) 930, 931.

"The wrong and injury were done in Florida, and the court below was sitting in that state; but, although the local substantive law governs, we are not bound by the Florida rule that pleadings are to be construed most strongly against the pleader."

"Construing the complaint, as required by the New Rules, so as to do speedy and substantial justice, we find that the death of appellant's husband was caused by the concurrent negligence of appellee and said telephone company."

See also

28 U.S.C.A., Title 28 foll. Sec. 723c, commencing page 404.

Hardin v. Interstate Motor Freight System (D. C. Ohio 1939), 26 F. Supp. 97.

Hollander v. Davis, 120 Fed. (2d) 131 (C..C.A. 5th Cir.).

ARGUMENT

Let us look at the amended complaint which commences on page 14 of the Transcript of Record. Paragraph XII, which appears on page 19 of the Transcript, reads as follows:

"That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben

> G. Lenske suffered pecuniary loss in that he had to and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, *and in that the amount of money available for fees for him was less than that which he would otherwise have received*, all to his damage and loss in the sum of $2920.80 as is more specifically set forth herein."

Paragraph XIII on page 19 of the Transcript of Record shows that Reuben G. Lenske expended $189.30 on account of the failure of defendant to carry out his agreement.

Paragraph XIV alleges that $900.00 is a reasonable sum for attorney's fees and covers the time expended by him on account of defendant's breach.

Paragraph XVI shows that defendant collected $705.00 in fees, of which Reuben G. Lenske was entitled to one-half under the agreement. Certainly no more pleading should be necessary on that.

In paragraph XX on page 21 of the Transcript of Record is the allegation:

> "That by virtue of the premises $1440.14 was paid out and disbursed to or for the delivery of the missing heir, which would otherwise inure to the benefit of all of the other heirs and a portion thereof would have inured to fees to Reuben G. Leniske."

In Paragraph XXI on page 22 we find the allegation:

> "That should and would not have been necessary had defendant performed his agreement."

In Paragraph XXII there is the allegation:

> "The net amount of fees to Reuben G. Lenske was less than it would and should have been by the sum of $950.00."

Going to the second cause of action we find the following in Paragraph V at the bottom of page 23 of the Transcript of Record:

> "That by virtue of the premises the following sums were paid out of said estate that *should and would have inured* to the five persons hereinabove mentioned, including plaintiff."

Again in Paragraph VIII on page 24 we find the following:

> "That by virtue of the premises various other disbursements were made out of said estate *that would and should have been disallowed if defendant had diligently carried out said agreement.*"

Also, the second cause realleges all of the allegations of the first cause and therefore the quotations from the first cause would apply to the second cause.

It is submitted that under the liberal construction to be given pleadings under the foregoing authorities, the allegations were sufficient to apprize defendant of plaintiff's claim that it was the breach of defendant that caused the plaintiff to lose the sums mentioned, and that plaintiff would have received those sums if defendant had performed his agreement.

On page 3 of defendant's brief he contends that plaintiff's first cause of action is not sustainable at all on the ground that an attorney is liable to his client

for negligence but not to a third party. Of course, there must be some privity of contract in order to give rise to a cause of action. What closer privity can there be between two parties to a cause of action than the ones who entered into the agreement? The first cause is based upon a direct agreement between Reuben G. Lenske and Albert L. Wagner. It should not take much argument to point out that Reuben G. Lenske is not a third party but is one of the two contracting parties. Obviously, where two attorneys have agreed to divide equally certain fees, the failure upon the part of one to carry out that agreement is actionable by the other. The same is true as to breach of other phases of the agreement.

It is respectfully submitted that under the procedure now in force in the Federal Court the issues in this case should be determined upon the evidence and not upon the manner of pleading.

REUBEN G. LENSKE,
Attorney for Plaintiff-Appellant.